313 U.S. 592

FILED
MAY 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 1042

CLYDE NIMERICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT; AND BRIEF IN SUPPORT THEREOF.

ARTHUR R. SEELIG,
Counsel for Petitioner.

JOSEPH E. GREEN,
HAROLD I. O'BRIEN,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
Petition for writ of certiorari	1
Summary and short statement of the matter involved	2
Statement of the basis upon which it is contended that this court has jurisdiction to review the judgment in question	5
Statement of the questions presented	6
Statement of the reasons relied on for the allowance of the writ	7
Prayer	7
Brief in support of petition	8
I. Opinion of Court below	8
II. Jurisdiction	8
III. Statement of the case	8
IV. Specification of Errors	18
V. Summary of Argument	19
VI. Argument	21
1. The court's refusal to charge the presumption of innocence was so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision	21
2. The testimony of an assistant United States attorney who did not withdraw from the case as to hearsay statements made outside the presence of the petitioner implicating him in another bank robbery was a most flagrant injustice to the accused and requires a reversal	27

PAGE

3. The government's impeachment of its own witness, Edward Bentz, was highly erroneous and gravely prejudicial to the petitioner 30

4. The reception in evidence of a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was prejudicial error 33

5. The hearsay testimony of the government witness Lynch was prejudicial error 35

6. The petitioner was unconstitutionally deprived of a right to trial by jury upon the issues framed upon his special pleas in bar. There was no waiver of that right 36

(i) The petitioner was entitled to a trial by jury upon the issues formed by the special plea 36

(ii) Trial by jury in a criminal case can be waived only by the express and intelligent consent of the petitioner; and waiver cannot be inferred from a failure to object to a trial without a jury 38

7. The evidence of the petitioner's guilt was not overwhelming. On the contrary, it was directly conflicting and afforded grounds for reasonable doubt 40

VII. Conclusion 46

LIST OF AUTHORITIES.

Agnew v. United States 165 U. S. 136..... 24

Baltimore and Ohio Railroad Co. v. State, 41 Md. 268 33
Berger v. United States, 295 U. S. 78..... 29

Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 564..... 33

Cochran v. United States, 157 U. S. 287.....6, 22, 24

Coffin v. United States, 156 U. S. 432.....2, 3, 23, 24

Commonwealth v. Hudson (Mass.), 11 Gray 64..... 33

Commonwealth v. Merrill, 8 Allen 545..... 37

PAGE

List of Authorities (continued).

Ellicott v. Pearl, 10 Pet. 412 33

Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82, 63 L. ed. 853, 856, 39 S. Ct. 435 41

Grant v. People (N. Y.) 4 Park. Cr. 527 37

Holt v. United States, 218 U. S. 245 24

In Re Campbell's Will, 100 Vt. 393 33

Jackson v. Varich (N.Y.) 7 Cow. 238 33

Johnston v. Marriage, 74 Kan. 208, 86 Pac. 461 33

Kreinir v. United States, 11 Fed. (2d) 458 26

McCandless v. United States, 298 U. S. 342 40

Patton v. U. S. (1929) 281 U. S. 271 38

People v. Clement, 72 Mich. 116, 40 N. W. 190 37

People v. Johnson, 314 Ill. 486, 145 N. E. 702 32

People v. Maggio, 324 Ill. 516 32

People v. Price, 74 Mich. 37, 41 N. W. 853 37

People v. Zachowitz, 254 N. Y. 192, 172 N. E. 466 34

Solliday v. Commonwealth, 28 Pa. 13 37

State v. Lizotte, 109 Vt. 378 ..... 2, 6, 26

State v. Newton, 39 Wash. 491, 81 Pac. 1002 37

State v. Rosa, 72 N. J. L. 462, 62 Atl. 695 37

State v. Strong, 39 La. 1081, 3 So. 266 37

State v. West, 105 La. 639, 30 So. 119 37

Tyrel v. Prudential Insurance Company of America, 109 Vt. 6 ..... 2, 3, 26

United States v. River Rouge Co., 269 U. S. 411, 421, 70 L. ed. 339, 346, 46 S. Ct. 144 41

Weaver v. United States, 111 Fed. (2d) 603 26

Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. ed. 761, 767, 48 S. Ct. 417 41

PAGE

STATUTES.

Judicial Code, as Amended, Section 240 (28 U. S. C. A. Sec. 347) 5

TEXT BOOKS.

16 Corpus Juris 925, Criminal Law, Sec. 2283..... 37
Treatise on the Law of Evidence, Third Edition, 1940, Vol. 3, Sec. 909, page 420..... 32

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No.

CLYDE NIMERICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Clyde Nimerick, respectfully prays this Honorable Court to issue a writ of *certiorari* to review that judgment of the United States Circuit Court of Appeals for the Second Circuit, rendered April 9, 1941, in the cause entitled *Clyde Nimerick* v. *United States of America,* numbered 17500, which judgment affirmed two judgments of the United States District Court for the District of Vermont, the first judgment convicting the petitioner of the armed robbery of a national bank, and the second of conspiracy to commit such robbery.

Summary and Short Statement of the Matter Involved.

The petitioner was convicted by separate judgments of the District Court for the District of Vermont, rendered July 3, 1940, of the armed robbery of the Caledonia National Bank of Danville, Vermont, and of conspiracy to commit such robbery. The conviction was affirmed by the Circuit Court of Appeals for the Second Circuit on April 9, 1941.

The matters appearing upon the record which the petitioner contends were errors of sufficient gravity in the instant case and raised questions of sufficient importance in general federal criminal jurisprudence to warrant the review presently sought are:

First: The trial court refused the petitioner's request for a charge to the jury that the petitioner was entitled to the benefit of the presumption of innocence without having given such a charge of its own accord. In thus denying the petitioner's request, the trial court followed two recent decisions of the Supreme Court of Vermont (*Tyrel* v. *Prudential Insurance Company of America*, 109 Vt. 6, at page 23, a civil case, and *State* v. *Lizotte*, 109 Vt. 378, a criminal case), in which that court held that, whatever might be the rule in other jurisdictions, the presumption of innocense is no longer a proper subject of instruction to the jury. Petitioner relies on the case of *Coffin* v. *United States*, 156 U. S. 432, in which this court held that the defendant is entitled to a charge stating in substance that he is presumed to be innocent until the contrary is proved beyond all reasonable doubt and that the presumption is evidence in his favor. The Circuit Court of Appeals expressed doubt as to whether *Coffin* v. *United States*, "still represents the opinion of the Supreme Court" in the following language:

"If the reasoning in *Coffin* v. *United States,* 156 U. S. 432, still represents the opinion of the Supreme Court we should perhaps treat the refusal to charge about the presumption of innocence in the form requested as reversible error. But the later Supreme Court cases we have cited appear to have modified, and perhaps even nullified, the views about the presumption of innocence expressed in *Coffin* v. *United States.* The more recent decisions indicate that the charge asked for would have been misleading and erroneous. * * * For ourselves, we prefer the view of the presumption of innocence taken by Professor Thayer and recently announced by the Vermont Supreme Court in *Tyrel* v. *Prudential Insurance Company of America,* 109 Vt. 6, 23, to that of the decisions which treat the presumption of innocence as evidence to be weighed by a jury in favor of the accused."

The Circuit Court of Appeals has thus held in effect (1) that a defendant is not entitled to a charge that he is presumed to be innocent and that the presumption is evidence in his favor, because the latter clause is no longer proper; and, (2) the request having improperly included comment to the effect that the presumption of innocence is evidence, the defendant may not complain of the refusal to give any instruction whatever upon the presumption of innocence.

Second: An assistant United States attorney engaged in the trial of the case for the prosecution, without withdrawing from participation in the trial, took the witness stand for the government and testified that one Eddie Bentz, a government witness who had pleaded guilty to the crime but who denied that the petitioner was implicated in it, had said, while in cus-

tody and outside the presence of the petitioner, "Why don't you try him" (the petitioner) "for the Brandon job? You've got a better case against him." The Circuit Court of Appeals held that such conduct on the part of a prosecuting attorney was "highly improper" but held that the error was "immediately corrected" by sustaining an objection with an instruction to disregard the observation. The Circuit Court of Appeals further said of this statement, "Indeed the remark tended to suggest a weakness of the proof against Nimerick in the case at bar."

Third: The trial court erred in permitting the government to impeach the testimony of Edward Bentz, its own witness, as will more fully appear from the statement of facts in the brief. The Circuit Court of Appeals indicated, without directly holding, that the impeachment was erroneous but held that it was not prejudicial.

Fourth: The trial court erred in admitting in evidence a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was committed when it was not suggested that the pistol was used in the robbery and it affirmatively appeared that no shot gun was utilized in the commission of the crime or in any overt act connected therewith. The Circuit Court of Appeals held the admission of the evidence error but harmless.

Fifth: The trial court erred in receiving the testimony of the government witness Lynch that a Chicago hotel keeper and his wife were unable to identify a photograph of the petitioner in the latter's absence, when the hotel keeper and his wife were not called as witnesses. The Circuit Court of Appeals held that the reception of the evidence, although error, was harmless.

Sixth: The petitioner filed special pleas of the Statute of Limitations to each of the indictments (R. 5 and 37). To each plea the government filed a replication that the petitioner was a fugitive (R. 6 and 38). The trial court disposed of the issues of fact thus formed by the special pleas and replications on a preliminary proceeding in a nature of a hearing on motion, without the intervention of a jury and without admonishing him that he had a right to such trial. It was and is contended that the petitioner was deprived of his constitutional right to trial by jury upon issues of fact which, if resulting in his favor, would have required his acquittal without having been apprised of his right and expressly and intelligently having waived it; and that failure to demand a jury is not a waiver of that mode of trial under the applicable rule announced by this court. The Circuit Court of Appeals overruled this contention.

The facts upon which the matters thus involved arise are stated in the supporting brief. Reference to the statement of facts there made, in lieu of a repetition thereof here, is here respectfully made.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

The jurisdiction of this court is invoked pursuant to Section 240 of the Judicial Code, as amended (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938). (28 U.S.C.A., Sec. 347). The judgment in question was rendered by the Circuit Court of Appeals for the Second Circuit on April 9, 1941, and is reported in 118 Fed. (2d) 464.

Statement of the Questions Presented.

The questions presented are:

First: Whether the trial court erred in refusing to charge that the petitioner was entitled to the presumption of innocence and in following to the law of the State of Vermont as enunciated in the case of *State* v. *Lizotte,* 109 Vt. 378, instead of giving a charge of the substance approved in *Cochran* v. *United States,* 157 U. S. 287, *Coffin* v. *United States,* 156 U. S. 432, and other federal cases.

Second: Whether the trial court erred in permitting an Assistant United States Attorney to testify to a conversation with the government witness Bentz outside the presence of the petitioner, in which Bentz said, "Why don't you try him for the Brandon job? You've got a better case against him."

Third: Whether the trial court erred in permitting the government to impeach the testimony of its own witness Edward Bentz.

Fourth: Whether the trial court erred in receiving in evidence the Government's Exhibits 6 and 6-A, being, respectively a 38 calibre revolver and holster, and Government's Exhibit 7, being a 12 gauge repeating shot gun.

Fifth: Whether the trial court erred in receiving the testimony of the government witness Lynch that a hotel keeper and his wife in Chicago were unable to identify the petitioner from a photograph.

Sixth: Whether the trial court erred in entering judgment without the intervention of a jury upon the question raised by the pleas of the Statute of Limitations, and without having apprised the petitioner of his right to a trial by jury upon such pleas.

Seventh: Whether, if all or some of the questions stated above are resolved by holding that the matters indicated, or some of them, constituted error—such error requires a reversal of the judgment upon the entirety of the record.

Statement of the Reasons Relied on for the Allowance of the Writ.

The petitioner maintains that the Circuit Court of Appeals, in affirming the judgment of the District Court, has decided the federal questions above stated in conflict with the applicable decisions of this court cited in the brief in support of this petition, *post,* and has sanctioned procedure in the trial court so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Prayer.

Wherefore, the petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit demanding that court to certify and to send to this court for review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 17500, *Clyde Nimerick* v. *United States of America,* and that such judgment of the Circuit Court of Appeals for the Second Circuit may be reversed.

ARTHUR R. SEELIG,
Counsel for Petitioner.

JOSEPH E. GREEN,
HAROLD I. O'BRIEN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of Court Below.

The decision of the Circuit Court of Appeals has been reported in 118 Federal Reporter, Second Series, at page 464. The opinion was filed on March 24, 1941, and judgment was entered thereon on April 9, 1941. The opinion is reproduced in the Record.

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this court is invoked has been made in the Petition. Reference is respectfully made thereto.

III.

Statement of the Case.

At two o'clock in the afternoon of June 4, 1934, two men entered and robbed the Caledonia National Bank in Danville, Vermont. Neither of the men is claimed to have been the petitioner, it being charged that the latter was stationed at the side of an automobile parked in front of the bank during the robbery and that he drove away with the two persons actually making the entry. It is not disputed that the two men who entered the bank were one Eddie Bentz and one Avery Simons.

The bank was located in the center of the town at a point approximately opposite the post office and town hall, on the main road (R. 82).

In the bank at the time of the robbery were the government witness Selden E. Houghton and Harriet J. McDonald, together with two other employees, one Addie Page and a Mrs. Wesson. By the testimony of the government witness Houghton it appears that the two men entering the bank held up the employees, forced them to lie on the floor, took the sum of $7,431.80 in cash, together with other securities and papers, the total value of the proceeds amounting to $18,276.80, forced the employees into the washroom and fled. Their actions in the bank are described in detail in the testimony of the government witness Houghton (R. 82-91) and Miss McDonald (R. 91-93), but are not here in controversy.

The robbers, Bentz and Simons, escaped in an automobile waiting in front of the Bank (R. 166). The prosecution sought to identify the petitioner as the driver of the car. The employees of the bank had no opportunity to see the car or its driver and hence were unable either to affirm or disaffirm the identification. Only two witnesses testified on behalf of the government with respect to the identity of the man at the car. The first of these was Doris Crane, who identified that man as being the petitioner. The second was Eddie Bentz, who, together with Avery Simons, pleaded guilty to the robbery, and who, with Simons, is a prisoner in Alcatraz. Simons was not called as a witness nor was his absence accounted for. Bentz, although called by the government as its witness, positively and emphatically denied that the petitioner was present outside the bank, denied that he was in any other way implicated in the robbery, and denied that he had ever named the petitioner in connection with the crime (R. 174).

Although it did not appear that Bentz had ever stated or intimated that the petitioner was a confederate, nor was it suggested that the government was surprised by the tenor of his testimony, the prosecution was permitted, over objection, to ask the petitioner on redirect examination as to whether antecedently to his taking the stand he had stated that he would not identify anyone as the third man whether the petitioner was guilty or innocent. The witness denied making such statements, but testified that what he had said was, "As far as my testifying is concerned, if you had the right man, I probably would" (R. 183).

After having permitted repeated questions as to whether the witness would identify anyone after he had unequivocally answered similar questions in the negative, the court permitted Mr. Ryan, an Assistant United States Attorney engaged in the trial of the case, and Frank C. Wood, a government agent, to testify in impeachment of Bentz that Bentz had told them in a conversation at the jail prior to his testimony that he would not identify anyone for fear of reprisal by his fellow convicts in the penitentiary (R. 190-195).

Ryan also testified as follows:

> "You" (Mr. McNamara, the United States Attorney prosecuting the case and examining the witness) "told him" (Bentz) "that Nimerick was being tried for the Danville bank robbery. He thought a minute and said, 'Are you trying him for that?' You said, 'Yes.' Then he said, 'Why don't you try him for the Brandon job? You have got a better case against him'" (R. 195).

This testimony was stricken on objection.

The only witness who undertook to identify the petitioner as the man in the car was Doris Crane (R. 122-148).

She testified, with unusual fidelity of memory as to details, that she had been born and reared around Danville where her mother and father lived. Her second marriage had been with a man named Eddie Foley at New York City. On June 4, 1934, over six years prior to her testimony, she drove to the post office in Danville, Vermont, around two o'clock in the afternoon, drove to the railroad station after discovering that it was too late to make certain that her mail would go out on the next train unless she delivered it to the station, and returned to the bank. On both occasions she saw a man whom she identified as the petitioner standing on the outside of the car with his foot upon the running board. She was able to describe his clothes in detail as consisting of a top coat, light hat, which she characterized as "soft," and a red tie (R. 124). As she was talking to a woman (who did not testify), she noticed two people getting in the car and observed the car "shoot out of town very quickly" going east. She learned about three minutes afterward that something had happened at the bank. She was unable to identify Eddie Bentz as one of the escaping robbers.

On cross-examination, however, notwithstanding her complete inability to identify Eddie Bentz as the escaping robber, it appeared that she had known Bentz for a number of years (R. 131), that he was a friend of her husband, that her husband was a bank robber, and that the last time she had heard from him he was in prison (R. 132). She categorically denied any complicity in or antecedent knowledge of the bank robbery, and denied that she knew that Bentz was a bank robber, stating, on the contrary, that she thought he was a cattle buyer and ex-pugilist (R. 132). (Bentz himself testified to an intimate acquaintance with the witness and to instances of the counting of proceeds of bank robberies with her husband in her presence and with her assistance (R. 171-172). His version of the rela-

tions between them will be dealt with later in this statement.) She admitted that she had met him at a country club in Dallas, Texas, in 1932 where she saw him playing golf with her husband.

She did not again see the petitioner until May 16, 1940, when she identified him at a hearing before the United States Commissioner in Chicago, Illinois (R. 137).

Bentz testified that he first met Doris Crane in Portland, Oregon, where she was registered at a hotel with Eddie Doll, whom she afterward married. He had seen her elsewhere—in Miami and Jacksonville, Florida, Dallas, Texas, Denver, Colorado, Chicago and New York. She was travelling and registered with Foley or Doll, as he was also called. They did not marry until about July of 1932. He testified that her means of livelihood was "the same as mine—bank robbery." He testified that she, he and her husband counted the proceeds of bank robberies in Portland, Oregon, and Dallas, Texas.

William P. Leiendecker testified that he was in the restaurant business in Rochester, Vermont. He said that he read in the paper that the Caledonia National Bank at Danville "had been robbed the morning after." He testified that "the evening before I read it in the paper," three men entered his restaurant about ten o'clock at night, and seated themselves at the counter (R. 149).

Nowhere in his testimony does the witness fix the date. Objection on the ground of failure to establish the time was interposed and overruled. His testimony in this connection was that the men entered the restaurant "the evening before; the day of the robbery." He fixed the date of the evening in question by placing it as the night before he read the account of the robbery in the paper and he fixed the time of the reading of the paper as the day after the men came into his place (R. 150). He had no knowl-

edge of the robbery other than that obtained in his reading of the paper.

He testified with minute and detailed particularity as to their attire and said, "Well, they had kind of gray trousers on—what they call a doe-skin trousers, and they had sort of gray flannel shirt and underneath they had very nice clothing on; white shirt or colored; and tie and very neatly laundered; they had a sweater tied with the sleeves around their neck." The man to the left of the witness had "a very peculiar red tie that I took particular notice of." The man in the center did most of the speaking. He ordered the food and they had coffee and pie. The man on the right end asked if the witness had any ice cream and the center man said "easy on the expense." The man on the farther end said, "what do you want to worry about, you bought out a town today?"

The witness identified the man who wore the red neck tie as the petitioner. He took particular notice of the shirt of the center man. Below the rough shirt there was a white shirt with a pink stripe. He noticed particularly because they were dressed very neatly underneath the rough clothes and when the man on his right bent over to sip some of his coffee, he noticed the butt of a gun through the gray shirt that was opened. He was quite a stout man.

He said that the men were in his restaurant about forty minutes. He testified that they had taken out a map and spread it on the counter. He said, "It appeared to me they were lost." They asked him information as to the different towns "to go toward Rutland way" and the witness showed them a route on the map. He said that they spoke in regard to getting away—getting to the main highway somewhere. The center man gave him a $100 bill and when the witness said that he was sorry that he could not

change it, the man gave him other money and said, "I guess they don't know what a hundred dollar bill is up here." The witness then said, "If you people come in the day time I would break it up for him." The witness said that the man had a "wallet with bills in that was about between three and four inches thick." The man gave him a one dollar bill, receiving twenty-five cents in change (R. 153).

The witness said that he had a radio in the restaurant, which was turned on. One of the men characterized the program as emanating from "a Vermont hick station." The witness said, "I am waiting for the news flashes." At the insistence of the men he turned the radio off.

He said that they had been shown pictures since that night. He was able to identify pictures of Bentz and Simons. On cross-examination he said that the first time he was able to identify the petitioner was from a picture which he saw in the Rutland Herald (R. 155). The court's attention is directed to this picture, Petitioner's Exhibit P (R. 280). The "X" over the head of the man identified as the petitioner was made by the witness Leiendecker. He identified him by his stature, his build. He identified him by "not his personal figure—his build." He studied the picture in the paper. The man whom he identified as the petitioner weighed "one-hundred eighty, or ninety pounds" (R. 156). Again, "the man in my restaurant weighed about 220 pounds" (R. 157). (In his testimony on the hearing on the pleas in bar, the witness said that the defendant weighed two hundred thirty pounds (R. 70)).

Theodore Bentz, a brother of Ed Bentz, testified that he was present when his brother met two men in Portland, presumably preparatory to the trip to Danville. On direct examination he identified the petitioner as one of such men (R. 160).

On cross-examination he said that he had never seen the petitioner before; that he paid no particular attention to him; that he was sixty feet away; that he only saw him when he got off the train and walked from the station to the taxi cab parked at the curb (R. 161); that he only saw him by "a casual glance" (R. 163); that he himself was serving a life sentence on a bank robbery conviction in Michigan but his application for leave to appeal from his conviction was yet pending (R. 162); that, although he said the petitioner was the man, he "did not believe in identification personally—100%"; and that his own conviction was a case of mistaken identity (R. 163). He denied on cross-examination that he was the third man implicated in the robbery (R. 163), but admitted that he had been arrested on suspicion therefor.

Edward J. Hayes, a government witness, testified to the details of an occasion on May 30, 1934, five days before the robbery, when he was held up at a garage in Gardner, Massachusetts, and a car was taken. He identified the petitioner as one of the robbers (R. 98-100). The owner of the car taken, Edmund C. Bouthot, identified the petitioner as present on the occasion and testified that the license plate number was 462-333 (R. 101-105).

The government witness Charles E. H. Evans testified that he was a taxi driver in Haverhill, Massachusetts; that on June 1, 1934, two passengers held him up, took his driver's license and stole his car. Identifying the petitioner as one of the passengers, he said that the petitioner had a machine gun and that the other man had a revolver. He also testified that they took eight or ten dollars (R. 105-112).

Arthur Benoit testified that in May, 1934, he was in the lunch car business in Winchenden, twelve miles from Gardner, Massachusetts. The same evening in May of

1934 that he had heard of a holdup in Gardner, he had three customers in his lunch car. Upon being shown photographs later by officers he recognized one of the pictures as that of Bentz and another as that of the petitioner (R. 114-118).

M. J. Lynch, a government agent, testified that the petitioner was arrested in Chicago on May 9, 1940, where he was living under the name of G. A. Meyers. He was permitted to testify that the petitioner had given as his address 4358 South Drexel Boulevard, Chicago, Illinois. He was also permitted to testify over objection that the address was that of an apartment hotel, that he examined the records of the hotel, and that he asked the manager of the hotel if he had ever had a guest by the name of Meyers. He exhibited photographs of Nimerick and said, over objection, that the hotel manager could not identify them. The hotel keeper was not called as a witness. This testimony was objected to as hearsay (R. 199-200). He was also permitted to testify, over objection, that he checked the purchase of a car by the petitioner and found that "he bought that car under the name of J. C. Adam."

He was permitted to identify, over objection, Government's Exhibit 6 and 6-A as the .38 revolver and holster found in Nimerick's automobile in 1940. He was permitted to identify, over objection, Government's Exhibit 7, which was a shot gun found in the pantry of the petitioner's apartment. The shot gun was dismantled at the time it was found. Neither of these exhibits was connected in any way with the crime for which the petitioner was on trial. Both the pistol and the shot gun were received as exhibits over the petitioner's objection.

Sterry R. Waterman, an attorney, testified for the petitioner that he was state's attorney of Caledonia County from 1933 to 1937. In the course of his official duties,

he had occasion to investigate the robbery of the Caledonia National Bank. He read in evidence a duplicate original statement of Doris Crane. In it Doris Crane gave an account of her movements inconsistent with her testimony (R. 213-214).

He further testified that she told him that she intended to go to the bank but had forgotten her vault key. She was unable to recognize Eddie Bentz from three photographs of him which he showed her (R. 215). No reference appeared in her statements to her recollection of the license plates as bearing the digits "3-3-3" or "8-8-8."

Frederick A. Flint, who had been Sheriff of Caledonia County for 18 years, testified for the petitioner that Doris Crane told him that one of the men had on a black or blue shirt (R. 219), which is at variance with her testimony on the trial. She denied knowing Eddie Bentz (R. 220). She also stated that she was standing on the steps of the post office talking with Mrs. Clara Fisher at the time the car pulled away from the bank.

Mrs. Clara Fisher testified for the petitioner that she was not present when the car pulled away from the bank and was not standing by the post office talking to Doris Crane (R. 222).

Byron W. Smith, a paper hanger and resident of Danville, Vermont, testified for the petitioner that he saw Doris Crane going into the post office at the time in question. He did not see anybody standing on the opposite side of the road with his foot on the running board of the car (R. 226).

The petitioner's motions for directed verdicts were overruled (R. 236).

The petitioner excepted the court's failure to charge the presumption of innocence (R. 243), and requested an

instruction as to such presumption. The court denied the request and noted an exception (R. 245). The court's refusal is assigned as error.

Oral motions for new trial and in arrest of judgment were denied, leave being granted to file written motions (R. 246). A written motion for new trial was filed as to each case (R. 19 and R. 50).

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in not reversing each of the judgments of the District Court.

2. The District Court erred in failing to charge that the petitioner was entitled to the presumption of innocence; and the Circuit Court of Appeals erred in not therefore reversing.

3. The District Court erred in not granting a mistrial or a new trial for the improper conduct of James F. Ryan, an assistant United States attorney; and the Circuit Court of Appeals erred in not therefore reversing.

4. The District Court erred in permitting the government to cross examine its own witness, Edward Bentz, and impeach his testimony; and the Circuit Court of Appeals erred in not therefore reversing.

5. The District Court erred in admitting in evidence Government's Exhibits 6, 6-A and 7, being a pistol, holster and shot gun; and the Circuit Court of Appeals erred in not therefore reversing.

6. The District Court erred in admitting the testimony of the government witness M. J. Lynch as to conversa-

tions outside the presence of the petitioner; and the Circuit Court of Appeals erred in not therefore reversing.

7. The District Court erred in disposing of the issues of fact raised by the special pleas in bar without a jury; and the Circuit Court of Appeals erred in not therefore reversing.

8. The District Court erred in refusing to grant a new trial upon the verdict in each case; and the Circuit Court of Appeals erred in not therefore reversing.

9. The District Court erred in entering judgment in each case; and the Circuit Court of Appeals erred in not therefore reversing.

10. The Circuit Court of Appeals erred in affirming and in not reversing each judgment.

V.

Summary of Argument.

1.

The court's refusal to charge the presumption of innocence was so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2.

The testimony of an assistant United States attorney who did not withdraw from the case as to hearsay statements made outside the presence of the petitioner implicating him in another bank robbery was a most flagrant injustice to the accused and requires a reversal.

3.

The government's impeachment of its own witness, Edward Bentz, was highly erroneous and gravely prejudicial to the petitioner.

4.

The reception in evidence of a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was prejudicial error.

5.

The hearsay testimony of the government witness Lynch was prejudicial error.

6.

The petitioner was unconstitutionally deprived of a right to trial by jury upon the issues framed upon his special pleas in bar. There was no waiver of that right.

(i)

The petitioner was entitled to a trial by jury upon the issues formed by the special plea.

(ii)

Trial by jury in a criminal case can be waived only by the express and intelligent consent of the petitioner; and waiver cannot be inferred from a failure to object to a trial without a jury.

7.

The evidence of the petitioner's guilt was not overwhelming. On the contrary, it was directly conflicting and afforded grounds for reasonable doubt.

VI.

Argument.

1.

The court's refusal to charge the presumption of innocence was so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The court, in its charge to the jury prior to requests and exceptions, failed to charge the presumption of innocence. The petitioner, before the jury retired, requested such a charge in the following language (R. 243):

> "The defendant excepts to the failure of the Court to charge the presumption of innocence, because we say that the rule is that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt and that this presumption attends him throughout the trial and is evidence in his favor, and in that connection we respectfully request the Court to charge *that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt and that this presumption is evidence in his favor and attends him throughout the trial, until such time is reached in the course of the trial—if that time is ever reached—when the jury find that this presumption has been removed or rebutted by competent evidence.*" (Emphasis supplied.)

The court refused to give the instruction (R. 245). Exception was saved and error assigned with respect to this ruling.

The attention of this court is respectfully directed to the holding of the Circuit Court of Appeals approving the refusal to give the instruction requested. The language of the latter court appears at pages 289 to 292 of the record. This court is particularly asked to notice that the reviewing court held that "the essentials of the usual charge as to the presumption of innocence are found" in the following language in the general charge (R. 289):

> "If, after an impartial consideration of all of the evidence, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and you should find him 'not guilty'. But if after such impartial consideration of all of the evidence you can candidly say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt, and you should find him 'guilty'."
>
> * * *
>
> "If there is more than one theory in this case, and if they are equally reasonable, one leading to guilty and the other to innocence, you must adopt the one leading to innocence, because it is safer and better to believe good of a person than to believe evil of him, if you can do so on the basis which is consistent in view of all the evidence in the case. * * *"

This court has directly held that a charge embodying the rule that the defendant must be proved guilty beyond all reasonable doubt is *not* tantamount to the charge of the presumption of innocence. In the case of *Cochran* v.

United States, 157 U. S. 287, the Supreme Court reaffirmed a view expressed in the earlier case of *Coffin* v. *United States*, 156 U. S. 432. In applying the rule of the *Coffin* case to the *Cochran* case, this court said at page 299:

> "It was held" (in the *Coffin* case) "that the charge that there could not be a conviction unless the proofs showed guilt beyond a reasonable doubt did not so completely embody the statement of the presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter. The court drew a distinction between the presumption of innocence as one of the instruments of proof, contributing to bring about that state of case, from which reasonable doubt arises, and a condition of mind called reasonable doubt produced by the evidence."

It has thus been precisely held by this court that a charge as to the necessity of proof of guilt beyond all reasonable doubt is not tantamount to an instruction entitling the defendant to a presumption of innocence. It is submitted that the right to an instruction in terms stating that the defendant is presumed to be innocent is not substantially accorded him by a statement that if there is more than one theory and if they are *equally reasonable*, one leading to guilt and the other to innocence, the jury must adopt the one leading to innocence "because it is safer and better to believe good of a person than to believe evil of him" if the "jury can do so on a basis that is consistent in view of all of the evidence in the case." The latter instruction not only fails to embody the principle of the presumption of innocence, but it intimates that the test is whether the alternative theories are "*equally reasonable*". The statement that it is safer and better

to believe good of a person than to believe evil of him is merely the court's opinion as to the reason for the rule given; and it is submitted that if there is a *"reasonable"* hypothesis consistent with innocence, the presumption prevails, although the conflicting theories are not "equally reasonable."

The court's attention is also directed to that part of the reviewing court's opinion which expresses doubt as to how far the rule announced in *Coffin* v. *United States*, 156 U. S. 432, "still represents the opinion of the Supreme Court." The reviewing court finds occasion to approve the record in respect to the failure to charge the presumption of innocence because the petitioner's request embodied the statement that the presumption of innocence "is evidence in his favor." The reviewing court recognized that this court had expressly characterized the presumption of innocence as *"an instrument of proof"* in *Coffin* v. *United States*, 156 U. S. 432, and that it reiterated that holding in *Cochran* v. *United States*, 157 U. S. 287, where it was observed that there was "a distinction between the presumption of innocence *as one of the instruments of proof"* and "a condition of mind called reasonable doubt produced by the evidence." Indeed, the Circuit Court of Appeals intimated that, if the view expressed in the *Coffin* case and the *Cochran* case "still represents the opinion of the Supreme Court, we should perhaps treat the refusal to charge about the presumption of innocence in the form requested as reversible error." The reviewing court then held that the case of *Agnew* v. *United States*, 165 U. S. 136, and *Holt* v. *United States*, 282 U. S. 245, had "modified and perhaps even nullified" the views expressed in the *Coffin* case.

It is respectfully submitted that there are two independent criticisms of this attitude of the Circuit Court

of Appeals. The first is that the *Agnew* case did *not* repudiate, but impliedly *confirmed*, the view expressed in the *Coffin* and *Cochran* cases. The following instruction was held properly refused where a proper instruction embodying the presumption of innocence was given because the *last sentence* might have tended to confuse:

> "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case *as matter of evidence to the benefit of which the party is entitled.* This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." (Emphasis supplied.)

It will be observed that the sentence criticized stated that the presumption of innocence was "evidence giving rise to resulting proof." The sentence before the last sentence, with which this court found no fault, stated that the presumption of innocence was to be regarded as "*matter of evidence to the benefit of which the party is entitled.*" Thus this court did *not* hold that the presumption of innocence is not an instrument of evidence, but that it is not to be accorded the legal efficacy of resulting proof. In the case of *Holt* v. *United States,* 282 U. S. 245, the Supreme Court refused to give an instruction on the presumption of innocence because that instruction had already been covered.

But there is another answer to the holding of the Circuit Court of Appeals. If it be supposed that the oral request of counsel for the petitioner made at the close of a long trial and in the surprise by which counsel must have been taken at the trial court's refusal to give of its own accord an instruction in accordance with an inveterate conception of the rights of an accused, was inarti-

ficially worded, it was clearly sufficient to direct the court's attention to its failure to charge the presumption of innocence. It is well settled that in a criminal case, that it is the duty of the court to instruct on all fundamental principles of criminal law whether requested or not.

In *Kreinir* v. *United States,* 11 Fed. (2d) 458, the Circuit Court of Appeals for the Second Circuit said at page 731:

> "In a criminal case a court should instruct on all essential questions of law involved in the case whether requested or not."

In *Weaver* v. *United States,* 111 Fed. (2d) 603, the court said, notwithstanding a rule requiring the submission of written instructions:

> "The rule is that, if it is the duty of the court to give an instruction in the first instance, there is a legal presumption that the court will do so and the defendant has a right to rely upon the presumption and file no written request. * * *
>
> "It has been said that in a criminal case a court should instruct in all essential questions of law involved in the case, whether requested or not" (citing numerous cases).

The Circuit Court of Appeals expressed its preference for the rule announced by the Supreme Court of Vermont in *Tyrel* v. *Prudential Insurance Company of America,* 109 Vt. 6, at page 23. The *Tyrel* case was a civil case. The rule there announced was followed, however, in *State* v. *Lizotte,* 109 Vt. 378. The latter case holds that the presumption of innocence is "for the court to consider in ruling whether sufficient evidence has been introduced to make it proper to submit the issues to the jury" and

"that it is not an appropriate subject with which to charge in this connection."

Certainly the view of the Vermont court has not yet become a part of the criminal jurisprudence of the United States courts.

It is earnestly submitted that the Circuit Court of Appeals failed to perceive that the presumption of innocence was not given substantial effect in the trial court; and that it has sanctioned conduct so far departing from the usual course of procedure as to require this court to grant its writ of *certiorari* and reverse the judgment.

2.

The testimony of an assistant United States attorney who did not withdraw from the case as to hearsay statements made outside the presence of the petitioner implicating him in another bank robbery was a most flagrant injustice to the accused and requires a reversal.

Charles F. Ryan, an assistant United States attorney engaged in the trial of the case for the prosecution, without withdrawing from participation in the trial, took the witness stand for the government and testified to a conversation with Bentz at the jail. (Insofar as the witness' testimony was received by the court over objection in impeachment of the testimony of the government's own witness Bentz, it will be the subject of consideration in the following topic of this argument.)

In addition to the testimony which the court admitted to the effect that Bentz had said that he would not identify anyone, the witness, a member of the bar, occupying the office of assistant United States attorney, and one of

counsel still engaged in the actual trial of the case, gratuitously volunteered the following damning utterance:

> "You" (Mr. McNamara, the United States Attorney prosecuting the case and examining the witness) "told him" (Bentz) "that Nimerick was being tried for the Danville bank robbery. He thought a minute and said, 'Are you trying him for that?' You said, 'Yes.' Then he said, '*Why don't you try him for the Brandon job? You have got a better case against him*'." (R. 195).

Of course objection was promptly sustained to this utterly indefensible matter and the jury was instructed to disregard it. But the harm was done. Twelve jurors had actually heard a United States attorney quote a hearsay statement, accusing the petitioner of a separate and independent crime—the robbery of another bank.

The extremity of this misconduct is apparently without precedent in the annals of criminal jurisprudence. It is not transcending the bounds of temperate argument to characterize it as outrageous.

The Circuit Court of Appeals, although disapproving this conduct, held that it was harmless. The Circuit Court of Appeals in justifying such conduct, in its opinion even intimates that such hearsay accusation of an independent crime might have been of benefit to the petitioner, by saying:

> "Indeed the remark tended to suggest a weakness of the proof against Nimerick in the case at bar. Its elimination from the record, with instructions to disregard it, was a sufficient disposition of the matter."

It is most respectfully urged that the "elimination from the record" of this grossly prejudicial remark was not

a sufficient disposition of the matter. The evidence was utterly incompetent for any purpose.

The inference was highly inflammatory. It is of no moment that the accusation was insinuated in a few words, confined to a single instance. A single accusation by an assistant United States attorney of a specific independent crime, when made under oath, is, as this court well knows, far more damaging than pages of general denunciation, vituperation and invective, which, however unjustified, amount to no more than characterization and opinion. Unfair *evidence* of the kind offered here is vastly more prejudicial than mere *argument*, however intemperate or improper.

The Circuit Court of Appeals held that "the mere mention of the Brandon incident added nothing of importance to his" (petitioner's) "proved criminal record and could not have affected the jury." There was no proved criminal record. Whether the petitioner was implicated in any of the crimes was a question of fact upon which the government's own evidence was in conflict. It cannot be said that the testimony in question did not produce the effect that it was obviously calculated to produce—the engendering of the gravest prejudice against the petitioner.

In *Berger* v. *United States*, 295 U. S. 78, this court said at page 88:

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight

against the accused when they should properly carry none."

The testimony of the government's attorney, insinuating by innuendo against which the defendant was powerless to protect himself that the defendant was guilty of another crime, required that the trial court either grant a mistrial or set aside a verdict of guilty.

3.

The government's impeachment of its own witness, Edward Bentz, was highly erroneous and gravely prejudicial to the petitioner.

On direct examination, Edward Bentz, the government witness and confessed participant in the robbery, was not asked as to the identity of his confederate in the car. On the contrary, on direct examination, and before he had been cross examined, he was asked:

> "At that time" (*i. e.*, the occasion of a conversation at the jail) "did we ask you what your attitude was going to be on identifying the prisoner here in court?" (R. 169).

After objection, this question was withdrawn, but it indicates that the government was not surprised at the failure of its witness to implicate the defendant.

On cross-examination, the witness categorically denied that the petitioner was a confederate (R. 174). He also testified on cross-examination to an intimate acquaintance with Doris Crane. She was shown by both her own testimony and that of Bentz to have been outside the bank at the time of the robbery. Each admitted knowing the other, although she said the acquaintance was confined to one casual meeting some years before.

The trial court, adopting the government's suggestion that the cross-examination of Bentz with respect to the identity of his accomplice and with respect to his acquaintance with another person present at the time of the *res gestae* amounted to the petitioner's making the witness his own, permitted re-direct examination in the nature of cross-examination. Upon such examination, the court, over objection, allowed the witness to be asked whether he had not made statements at the jail to the effect that he would not identify the petitioner whether the latter was the right man or not (R. 180-183).

The Circuit Court of Appeals held that this testimony "plainly involved impeachment of its own witness by the government" (R. 287) and intimated that the evidence "should have been excluded under the strict and much criticized rule against impeaching one's own witness" (R. 288).

Petitioner seriously argues that the error was not slight. The effect of the court's ruling was to permit the government to call as a witness one whom they believe to be a perjurer, *but without whose testimony the antecedent preliminary crimes could not be connected with the bank robbery.* Yet, when its own witness positively denied that the petitioner was implicated in any of the crimes, the government was permitted over objection to show his alleged hearsay statements (which the witness denied making) and which, if believed, bereft the petitioner of the benefit of the testimony of government's own witness which completely exonerated him. What the effect of Bentz' testimony, if it had not been impeached, might have been is not a proper subject for speculation of a reviewing court. It was a question for a jury.

It is submitted that there is no occasion for characterizing the well settled rule invoked as "strict and much criticized." Any other rule would permit any party, prose-

cutor or defendant, to call as a witness a known perjurer and thereby lay a foundation for that perjurer's hearsay statements. It would add a new exception to the hearsay evidence rule; and that rule would amount to the proposition that, although hearsay evidence is generally inadmissible, it may be admitted when the author of the hearsay statements is shown to be a perjurer.

The cross-examination of Bentz did not make the latter the petitioner's witness for any purpose. The scope of cross-examination is especially liberal with respect to the relations of an alleged accomplice to other persons connected with the crime. *People* v. *Maggio,* 324 Ill. 516. But in any event, it is well settled that one who has called a witness may not thereafter impeach him even with respect to matters as to which he testifies as a witness for the adversary party.

Professor Wigmore, in the 1940 edition of his classical *Treatise on the Law of Evidence,* after discussing the unquestioned principle that generally one may not impeach his own witness, says:

> "The conventional reason for the rule" (*i.e.,* the rule forbidding impeachment of one's own witness) "is that the calling party *guarantees* the witness' credibility. Taking this as a test, it is clear that if A calls the witness, *A cannot thereafter impeach him, even when B has subsequently called him.*" Wigmore on Evidence, Third Edition, 1940, Vol. 3, Sec. 909, page 420.

In *People* v. *Johnson,* 314 Ill. 486, 145 N. E. 702, the court said:

> "This guaranty of credibility, if we may call it such, relates to the witness' general trustworthiness and not to the correctness of specific statements of fact. The guaranty being of the continuing single quality of

trustworthiness, it is inseparable and cannot be construed as existing for some statements and not for others. Therefore, if A calls a witness and obtains his testimony, and B afterwards calls him, A cannot impeach the credibility of the witness by proving that he has made statements out of court different from those made upon the witness stand, or by proving him to be of such general bad character as renders him unworthy of credit. (2 Wigmore on Evidence,—2nd ed.—sec. 909; *Ellicott* v. *Pearl,* 10 Pet. 412; *Commonwealth* v. *Hudson,* 11 Gray. (Mass.) 64; *Carlisle* v. *Norris,* 215 N. Y. 400, 109 N. E. 564; *Baltimore and Ohio Railroad Co.* v. *State,* 41 Md. 268; *Johnston* v. *Marriage,* 74 Kan. 208, 86 Pac. 461.) The testimony given by Madeja and Farina as witnesses for plaintiff in error was important, and it was reversible error to permit these witnesses to be improperly impeached."

To the same effect are *Commonwealth* v. *Hudson,* (Mass.), 11 Gray 64; *In re*: *Campbell's Will,* 100 Vt. 393, *Jackson* v. *Varich,* (N. Y.) 7 Cow. 238, and many other cases.

4.

The reception in evidence of a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was prejudicial error.

The Circuit Court of Appeals held that the reception of a pistol and shot gun, neither of which had been shown to have been an implement of the crime, was error, but held that the "effect was as illusory as their logical significance" (R. 288).

The petitioner not only admits that the weapons could not have logically tended to convince the jury of his guilt; he earnestly contends as much. But the evidence *did* un-

questionably tend to convince the jury that he was a man of sinister antecedents. *The well known propensity of juries to convict a man accused of one crime because the jury believes him to be of general bad character is a foundation of the rule which excludes evidence of other crimes.*

This evidence was pregnant with two illicit but virulent implications: *first,* that the jury had a right to take into consideration that the petitioner was a man of criminal or vicious propensities; and, *second,* that the mere possession of firearms was an indication of such propensities. Not only may the government not introduce evidence of other crimes, but it is not suggested that the possession of these firearms either constituted or was evidence of any other offense.

A single quotation from a case of the Court of Appeals of New York is deemed sufficient to sustain the petitioner's contention that the introduction of these exhibits was highly erroneous.

In *People* v. *Zachowitz,* 254 N. Y. 192, 172 N. E. 466, the court said through Mr. Justice Cardozo:

> "To be armed with weapons at the very moment of an encounter may be a circumstance worthy to be considered, like acts of preparation generally, as a proof of preconceived design. There can be no such implication from the ownership of weapons which one leaves behind at home.
>
> "The endeavor was to generate an atmosphere of professional criminality. * * * Brought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping. He was made to answer the charge, pervasive and poisonous, even if insidious and covert, that he was a man of murderous heart, of evil disposition."

Mr. Justice Pound, dissenting, said:

> "*The case would have been quite different if the weapons came into defendant's possession after the killing.* The proof would then be of separate crimes unconnected with the killing and its admission reversible error under the *Molineux* case."

No necessity is perceived for multiplying citations of authority to the same effect. The testimony as to the possession of the weapons by the petitioner, coupled with their visible and tangible presence as displays before the jury, was calculated to and necessarily did create a violent prejudice against the petitioner. Their introduction in evidence was reversible error.

5.

The hearsay testimony of the government witness Lynch was prejudicial error.

The trial court permitted the government's witness Lynch to testify, over objection, that a hotel man in Chicago was unable to identify the petitioner from a photograph in response to inquiries made by the witness. The Circuit Court of Appeals held this evidence incompetent as hearsay but further held that its admission was not prejudicial because in the view of the latter court it tended to corroborate the petitioner's claim that he did not live there. It was intended to and did, however, have the effect of showing that the petitioner had lied to government officers in connection with such inquiry. The petitioner's statement was thus impeached by the admission of the evidence and he was denied his constitutional right by confrontation. This error, coupled with other flagrant errors intervening upon the trial, should not have been ignored by the Circuit Court of Appeals.

6.

The petitioner was unconstitutionally deprived of a right to trial by jury upon the issues framed upon his special pleas in bar. There was no waiver of that right.

The petitioner filed identical special pleas in each case asserting the defense of the statute of limitations (R. 5 and 37). The government filed identical replications averring that the petitioner was a fugitive (R. 6 and 38). The issue thus joined was one of fact. It was disposed of by the trial court, prior to the petitioner's arraignment, upon the hearing of the testimony of witnesses, without a jury, and without a waiver of the right to trial by that mode.

That this was error requiring a reversal of the judgment is demonstratively clear both upon principle and under the authorities. It is well settled, *first,* that a defendant is entitled to a trial by jury upon any issue of fact, whether such issue be joined upon plea of not guilty or upon special plea in abatement or in bar; and, *second,* in the United States courts, that trial by jury can be waived only by the *express and intelligent consent of the defendant himself,* no waiver being implied from mere failure to demand a jury.

(i)

The petitioner was entitled to a trial by jury upon the issues formed by the special plea.

Protracted argument and the extensive citation of authorities are not necessary to demonstrate that the petitioner had the right to a trial by jury upon any issue of fact and that the right to trial by that mode is not confined to the question of substantive guilt.

In 16 Corpus Juris 925, title *Criminal Law,* Sec. 2282, it is said:

> "Whether the prosecution was begun within the period of limitations, where a question of fact is involved, is for the jury."

This principle has been applied specifically to questions of fact arising upon the defense of statute of limitations in *State* v. *West,* 105 La. 639, 30 So. 119; *State* v. *Strong,* 39 La. 1081, 3 So. 266; *People* v. *Clement,* 72 Mich. 116, 40 N. W. 190; *State* v. *Newton,* 39 Wash. 491, 81 Pac. 1002; *People* v. *Price,* 74 Mich. 37, 41 N. W. 853. No authority has been discovered to the contrary, nor is any principle perceived upon which contrary authority could be founded.

More numerous are the authorities sustaining the right in the case of the defense of former jeopardy. Such cases are strictly analogous to cases involving the statute of limitations, since both defenses are in bar and both involve the assertion of facts other than that of the defendant's innocence.

In 16 Corpus Juris 925, title *Criminal Law,* Sec. 2283, it is said:

> "Where, however, the plea is based upon a matter of fact which is shown by evidence outside the record, the determination of the question of former jeopardy, or of the identity of the present offense with that charged on the former trial, is generally for the jury, and the court cannot overrule the plea because of facts within its own knowledge."

Some forty cases are cited in support of the principle thus enunciated. It is deemed sufficient to cite here *Commonwealth* v. *Merrill,* 8 Allen 545, *Grant* v. *People,* (N. Y.) 4 Park. Cr. 527, *State* v. *Rosa,* 72 N. J. L. 462, 62 Atl. 695, and *Solliday* v. *Commonwealth,* 28 Pa. 13.

(ii)

Trial by jury in a criminal case can be waived only by the express and intelligent consent of the petitioner; and waiver cannot be inferred from a failure to object to a trial without a jury.

In *Patton* v. *U. S.*, (1929) 281 U. S. 271, the Supreme Court of the United States elaborately considered the question of whether a defendant may waive the right of trial by jury in United States courts in felony cases *at all.* After an extensive review of the authorities and discussion of principles, and after recognizing that in many jurisdictions, trial by jury may not be waived in felony cases by any means, the court at length reached the conclusion that waiver of trial by jury is possible *where the government and the court consent to such mode of trial and the defendant, after being apprised of his right to a jury, independently elects to dispense with it.*

The court said at page 312, *et seq.*:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That, perhaps, sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriations of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, *before any waiver can*

become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." (Emphasis supplied.)

That no such express and intelligent consent was given in this case is patent. The right being of a character which could be waived only upon compliance with the requirements enunciated in the foregoing decision, it follows that judgment of conviction was pronounced without either the intervention of a jury or the effective waiver thereof, upon a question of fact as to which, had the petitioner prevailed, he would have been entitled to his freedom. This error peremptorily requires a reversal of the judgment.

The Circuit Court of Appeals failed to give effect to the rule that error *appearing on the common law record* not only need not but cannot be the subject of a bill of exceptions. The holding of a trial together with an impanelling of a jury, if there is a jury, is of course a part of the common law record.

The Circuit Court of Appeals also failed to give effect to the plain holding of this court that whatever may be the rule as to the waiver of many errors in a criminal case by acquiescence, trial by jury can be waived only "upon the express and intelligent consent of the defendant." The requirement of an affirmative consent is inconsistent with the requirement of an affirmative demand or objection.

The question of the petitioner's flight was not in issue under the plea of not guilty. Although ordinarily the question of the Statute of Limitations is put in issue by such a plea, that is not the case where the court has already found the facts contrary to the plea upon its record.

This court has repeatedly affirmed the importance of the preservation of right of trial by jury and of resolving all doubts in favor of the protection of that mode of trial. It is contended that the importance of preservation of trial by jury, with the important incidental right that it cannot be waived, except expressly and intelligently, requires this court to reverse the judgments in the present case.

7.

The evidence of the petitioner's guilt was not overwhelming. On the contrary, it was directly conflicting and afforded grounds for reasonable doubt.

The Circuit Court of Appeals said at page 287, "the evidence of the defense was trivial and the proof of guilt overwhelming." Again, it was said at page 288, "evidence is rarely adduced in a case which so inevitably establishes guilt as did the proof here."

It is respectfully and most earnestly submitted that neither of these statements find confirmation in the record. The petitioner is well aware that this court will not review the weight of the evidence. However, the opinion of the Circuit Court of Appeals directly raised the question not of the weight of the evidence but whether the evidence is of so demonstrative a character that the errors intervening on the trial do not warrant reversal.

In *McCandless* v. *United States,* 298 U. S. 342, the Supreme Court, in considering the question of whether the amendment to the Judicial Code (28 U. S. C. A. 391) modi-

fied the common law rule that, where substantial error is shown, absence of prejudice must affirmatively appear, said at page 347 (the word "*affirmatively*" is italicized by the court):

> "In this situation, Sec. 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421, 70 L. ed. 339, 346, 46 S. Ct. 144; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, 63 L. ed. 853, 856, 39 S. Ct. 435; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26, 72 L. ed. 761, 767, 48 S. Ct. 417."

The offense for which the petitioner is imprisoned by the judgment here under review occurred more than six years prior to the trial. The government's own evidence is directly contradictory upon the question of the guilt of the accused. Edward Bentz, the prosecution's own witness, categorically denied that the petitioner was the third member of the trio.

The direct and positive testimony of Edward Bentz is contradicted only by evidence which, intrinsically and without regard to its conflict with the testimony of Bentz, is not strong. Identification by witnesses six years after an event, where none of the witnesses had ever seen the petitioner before the occurrence and none of them had seen him afterwards until a few days before the time of the trial, may be sufficient to sustain a conviction where

such evidence is not contradicted, where the record is free of substantial error, and where the identification itself is not inherently inconsistent with probability. But it is at best frail evidence.

In the present case, not only is there a contrariety in the government's own evidence as to the petitioner's guilt, and not only is the competent evidence indiscriminately admitted with wholly incompetent and highly prejudicial hearsay testimony and evidence of a general criminal disposition on the part of the petitioner, but the identification itself is highly unreasonable.

William Leiendecker undertook to place the petitioner as being in his restaurant at some unestablished date, but which the jury was left to assume was the night of the robbery (R. 149). Edward Bentz not only positively and directly contradicted this testimony, but gave a highly convincing reason for its improbability. He testified fully and candidly to the careful and deliberate preparation for the crime, and the charting of the avenue of escape. He testified that he drove over the road three or four times. He said:

> "That's always done in regard to the bank. This preliminary of the road. We write it down and chart it as a log. Every turn is charted. We had such a chart made before the robbery of this particular bank. I made it myself. The first time, I would say about May the 5th, 1934. * * * By running a road I mean driving along the route of our proposed getaway and charting the roads we intend to take. The reason of that is because here you might come down a road and the road might lead into town and you would have to back up maybe five miles, rearrange your course and you might have to go back another five miles to get another road leading to the right in order to miss that town; that's what we mean by 'running the road.'

That's why it takes three or four days. In other words, you try to avoid all the cities'' (R. 175).

It must be remembered that this was the *government's witness' own version of the preparation for the crime.* The witness testified that they had two days' supply of food in the car so that a stop at a restaurant would not be necessary (R. 176).

The evidence leaves no doubt that the perpetrators of the crime were thoroughly sophisticated bank robbers. They were aware of the hazards which the crime entailed. The government's own proof is that they exerted the utmost effort to minimize those hazards. Yet Leiendecker testified that Bentz, Simons and the petitioner not only entered his restaurant, which Bentz denies (R. 176); that they were all dressed in identical and extraordinary costume, viz., gray doe skin trousers, gray flannel overshirts, neatly laundered dress shirts and sweaters with sleeves tied about their necks (R. 150); that they revealed a pistol; that they first gave the witness a one hundred dollar bill but then withdrew a one dollar bill from a wallet that was ''between three and four inches thick'' (R. 153); and that they ''appeared to be lost,'' examined maps and asked the road out of town.

In respect to this last item of his testimony, Bentz testified as follows:

''Q. As a matter of fact, you had to stop at Rochester to ask someone that was running the restaurant there the road out of town, didn't you? A. *Me* ask the road out of town?

''Q. Didn't you examine some maps in Rochester? A. Absolutely not. That road was already run, why would I ask anybody?'' (R. 176).

It is submitted that, even though Bentz is a convict whose testimony the government itself was permitted to

denounce as unworthy of belief, his recital is vastly more reasonable than that of the witness Leiendecker. It is highly probable that experienced bank robbers would chart their course as Bentz testifies that they in fact did. It is grotesquely improbable that, having carefully planned to avoid all encounter with those who might identify them, they would stop on the night of the robbery at a restaurant, display the proceeds of and jest about a robbery, when, according to the same witness, they feared that news thereof might be broadcast at any moment; adopt a uniform and highly unusual attire; and hand the restaurant proprietor a one hundred dollar bill, when by his own testimony they were able to give him a dollar.

The court is particularly asked to consider the striking method of identification employed by this witness. Although, according to his own testimony he was unable to identify any pictures of suspects shown him by government agents (at a time when other witnesses were being shown pictures of the petitioner by the same government agents), he was able positively to identify the petitioner from his "build" or "stature"[1] as shown in a newspaper photograph appearing in the Rutland Herald (R. 280, Petitioner's Exhibit P).

In appraising the contradiction between the testimony of Bentz, consistent, as it is, with reasonable probability, and the testimony of Leiendecker, abounding, as it does, in melodramatic color, the least that can be said is that the testimony of the latter is in direct and irreconcilable conflict with that of Bentz, a government witness.

The testimony of Doris Crane, in view of her background, her suspected complicity in the crime itself, the

---

[1]The witness Leiendecker had variously testified as to the weight of the petitioner as being 180, 190, 200, 220 and 230 pounds.

inconsistencies therein, its inherent improbability and its contradiction by her own previous statements is really not worthy of serious consideration.

Theodore Bentz, a brother of Eddie Bentz and a government witness, who had been arrested as a suspect for the crime, who had the most compelling motive for diverting serious suspicion from himself, whom admits that he does not "believe in identification" (R. 163), undertook to say that he saw the petitioner for the first and only time—"just looked at him because he happened to be there—a casual glance" in Portland, Maine, with his brother.

No other witnesses directly connected the petitioner with the crime. The identification of the petitioner in other robberies depends entirely upon the credibility of witnesses, each of whom claims to have seen him only once, more than six years ago, and each of whom admits that photographs of the petitioner suggested recollection.

The court is not confronted with the question of whether such evidence would be sufficient to support a conviction if the petitioner had had a fair trial, free of substantial error. The petitioner was required to encounter not only such competent evidence as legitimately proposed a question of its credibility to a jury, but was compelled to submit that question to a jury which had heard him in effect accused, by one of the counsel for the prosecution, testifying under oath, of another bank robbery; which had heard the testimony of the government witness Bentz, which testimony, if true, entirely exonerated him, impeached by incompetent hearsay evidence; which had seen brandished before them weapons taken from the petitioner five years and eleven months after the commission of the crime; which had listened to hearsay testimony that the petitioner had not in fact lived at the address he gave in Chicago; and which had not been instructed that he was presumed to be innocent.

VII.

Conclusion.

For the reasons urged in the foregoing argument, it is respectfully prayed that the court grant its Writ of Certiorari to review and reverse the judgment of the Circuit Court of Appeals and the judgments of the District Court herein questioned.

Respectfully submitted,

ARTHUR R. SEELIG,
Counsel for Petitioner.

JOSEPH E. GREEN,
HAROLD I. O'BRIEN,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	15

CITATIONS

Cases:	
Abdo v. *Townshend*, 282 Fed. 476	14
Agnew v. *United States*, 165 U. S. 36	10
Cochran v. *United States*, 157 U. S. 286	9, 10
Coffin v. *United States*, 156 U. S. 432	9, 10
Fournier v. *United States*, 58 F. (2d) 3	14
Green v. *United States*, 154 Fed. 401	12
Holt v. *United States*, 218 U. S. 245	10
Litsinger v. *United States*, 44 F. (2d) 45	14
Patton v. *United States*, 281 U. S. 276	13
Porter v. *United States*, 91 Fed. 494	13
State v. *Hayes*, 162 La. 918	12
State v. *Rook*, 61 Kans. 382	12
State v. *Snyder*, 182 Mo. 462	12
Thompson v. *State*, 54 Miss. 740	12
United States v. *Brace*, 143 Fed. 703	12
United States v. *Cook*, 17 Wall. 168	12
United States v. *Ike Young*, 107 F. (2d) 490	14
United States v. *Murdock*, 284 U. S. 141	12
United States v. *Socony Vacuum Oil Co.*, 310 U. S. 150	13
United States v. *Trenton Potteries*, 273 U. S. 392	13
United States v. *White*, 5 Cranch 73	12
Miscellaneous:	
Thayer, *Preliminary Treatise on Evidence*, App. B, pp. 551–553	11
Wigmore on Evidence, Sec. 2511	11
34 A. L. R. 938	10
94 A. L. R. 1042	10

320595—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1042

CLYDE NIMERICK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 283–290) is reported in 118 F. (2d) 464.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 9, 1941 (R. 291). The petition for a writ of certiorari was filed May 10, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court's instruction to the jury upon "presumption of innocence" adequately protected the defendant's rights, where the trial court did not employ the customary formula, but did charge that the return of the indictment and the circumstance of the accused's being on trial should not be considered as evidence of his guilt, and further charged that the Government's case must be established beyond a reasonable doubt.

2. Whether petitioner was deprived of a trial by jury on his defense of statute of limitations, where the trial court, without objection by defense counsel, heard testimony upon the issue in a preliminary hearing on petitioner's special plea in bar and ruled against the petitioner, and where petitioner was not denied an opportunity to retry the issue before the petit jury which convicted him.

3. Whether errors were committed in the admission of evidence, and if so, whether such errors were prejudicial in view of the overwhelming evidence of guilt.

STATEMENT

On February 14, 1939, two indictments were returned against the petitioner in the District Court of the United States for the District of Vermont, one charging him with armed robbery of the Caledonia National Bank at Danville, Vermont, on June 4, 1934 (U. S. C. Title 12, Section 588b), the other charging him with having conspired with

Edward Bentz and Avery Simons to rob the bank (U. S. C. Title 18, Section 88) (R. 1–5, 34–36).

The petitioner, by special pleas in bar, invoked the statute of limitations (R. 5–6, 37). The Government by replications alleged that the petitioner had been a fugitive from justice during the period between the commission of the offenses and the return of the indictments (R. 6–7, 38). At a preliminary hearing upon the issue thus formed, evidence was submitted to the court without a jury, and the trial court found that petitioner had been a fugitive from justice and that therefore the indictments were not barred (R. 1, 61–80).

Petitioner thereupon pleaded not guilty and proceeded to trial (R. 1, 81). On July 3, 1940, he was found guilty on both indictments (R. 1, 245) and was sentenced to twenty years imprisonment on the substantive indictment and two years on the conspiracy indictment, the sentences to run concurrently (R. 10–11, 41–42, 247). The judgments of conviction were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 291).

As the court below said (R. 286): "Evidence is rarely adduced in a case which so inevitably establishes guilt as did the proof here". In brief, the record shows:

The Caledonia National Bank of Danville, Vermont, was robbed on June 4, 1934, by Bentz and Simons while a third participant, the driver of

their car, waited outside (R. 82–93). Bentz and Simons had pleaded guilty and were confined in Alcatraz under sentence for their participation in this offense at the time the indictments in the present case were returned (R. 35, 165, 170). So much is undisputed (Pet. 8). Identification of the petitioner as the third participant was all that remained to be proved in the present case.

Government witness Doris Crane positively identified the petitioner as the man whom she saw standing outside the bank with his foot on the running board of the get-away car while the robbery was being committed and who drove off with the robbers (R. 124, 126, 134, 145).

The get-away car was a dark blue Ford with cream colored wheels bearing Massachusetts license plates with a number ending in "333" (R. 123, 166). Two witnesses testified that petitioner and Simons held them up at the point of a gun on May 30, 1934, at Gardner, Massachusetts, and stole a Plymouth car bearing Massachusetts license tag No. 462–333, which was found abandoned the next day with license plates missing (R. 94, 103). Witness Benoit testified that on the night of the Gardner holdup Nimerick, Bentz and another stopped to eat at his lunch counter in Winchenden, Massachusetts, ten or twelve miles from Gardner (R. 114–115). Petitioner was also identified as one of two men who stole a dark blue Ford with cream colored wheels in a machine gun holdup at Haverhill, Massachusetts, on June 1,

three days before the Danville robbery (R. 106–109). Theodore Bentz, brother of Edward Bentz, testified that he had seen Edward, Nimerick, and a third man drive out of Portland, Maine, on the night before the Danville robbery in a dark blue Ford or Chevrolet with light wheels (R. 160). A restaurant proprietor in Rochester, Vermont, a considerable distance south of Danville, identified Nimerick as the man who had entered his restaurant on the night of the bank robbery in the company of Edward Bentz and Avery Simons (R. 151–154).

The Government put Edward Bentz, the self-confessed participant in the Caledonia Bank robbery, on the stand. He testified (R. 166–167) that he and two others left Portland, Maine, on the night before the bank robbery, in a dark blue Ford sedan; that he and one of his companions entered the bank while the third stayed outside; and that after the robbery they drove from Vermont to New York along a route which took them through Rochester, Vermont. Bentz was not asked by the Government if petitioner was one of the participants in the bank robbery.

The cross examination of Bentz, after some preliminary inquiries, went into the subject of his acquaintance with Doris Crane, the eye witness who put Nimerick at the scene of the crime (R. 170–173). On objection by the Government, defense counsel was permitted to continue along this line by making the witness his own (R. 173, 180).

Thereafter Bentz testified that a "Smitty" was driving the robbery car and that petitioner was not "Smitty" (R. 174). On further examination by the Government, Bentz testified that the United States Attorney, Assistant United States Attorney Ryan, and Mr. Wood, an F. B. I. agent, interviewed him at the jail in advance of trial (R. 179) and that at that time he did not know whom they had as a defendant in the case (R. 183). He was asked if at that time, before he had an opportunity to view the defendant, he had stated, "I won't put the finger on anybody and you ought not to ask me to put the finger on anybody because of what it would mean to me when I get back to Alcatraz" (R. 181). He denied making such a statement (R. 181).

F. B. I. Agent Wood was then called to the stand and testified that Bentz had told them in the conference in the jail that "if he were asked if the man were with him on the job that he would not identify him, even though the man had been with him" (R. 191); that "in his opinion we should not ask him to identify the defendant, whom we had here," since he had had trouble at Alcatraz "trying to get along with the boys there" because they thought he had informed on Simons; and that "he thought he had cooperated with the Government enough so that he should not be asked to put the finger on him" (R. 190–191). Bentz was then assured that the Government would not ask

him to identify the third participant in the Danville holdup (R. 191). Wood also testified that though Bentz was constantly in contact with federal officers, he at no time even intimated that petitioner was not the right man (R. 191–192).

Assistant United States Attorney Ryan was also called to the stand and testified to the same effect, adding that when Bentz was told that petitioner was being held for the robbery, Bentz stated, "Why don't you try him for the Brandon job, you have got a better case against him" (R. 194–196). The jury was instructed to disregard this latter statement (R. 195).

The petitioner did not take the stand and witnesses called by him to discredit Doris Crane instead corroborated her in all essential particulars (R. 211–226). Indeed, Edward Bentz testified that he pleaded guilty because he "knew she was an eye-witness of the fact the car was outside the bank there that day—the day that it got away—that is, I saw her across the street" (R. 177).

ARGUMENT

I

Petitioner's first contention is that the trial court failed to instruct the jury that he was entitled to the presumption of innocence (Petition 21–27). The charge requested by the petitioner was as follows:

> * * * that the defendant is presumed to be innocent until proven guilty beyond a

> reasonable doubt and that this presumption is evidence in his favor and attends him throughout the trial, until such time is reached in the course of the trial—if that time is ever reached—when the jury find that this presumption has been removed or rebutted by competent evidence (R. 244).

The charge given by the trial court was in part as follows:

> The fact that this defendant is here under indictment and on trial is not to be taken against him. The indictments which have been found and on which he is being prosecuted are no evidence whatsoever of the defendant's guilt. They are simply accusations which charge him with the offenses, and no juryman should allow himself to be influenced in the least degree by that fact (R. 238).
>
> * * * * *
>
> The burden is upon the Government to make out every essential element of each case, and that the Government must do beyond a reasonable doubt. You cannot find the defendant guilty under either of the indictments unless from all of the evidence you believe him guilty beyond a reasonable doubt. * * *
>
> If, after an impartial consideration of all of the evidence, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and you should find him "not guilty." But if after such impartial consideration of all of

> the evidence you can candidly say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt, and you should find him "guilty" (R. 240).
>
> * * * * *
>
> If there is more than one theory in this case, and if they are equally reasonable, one leading to guilty and the other to innocence, you must adopt the one leading to innocence, because it is safer and better to believe good of a person than to believe evil of him, if you can do so on the basis which is consistent in view of all of the evidence in the case (R. 241).

Petitioner assumes that both courts below were of the view that an instruction defining "reasonable doubt" is "tantamount to the charge of the presumption of innocence" (Pet. 22–23) which is contrary to *Coffin* v. *United States,* 156 U. S. 432 and *Cochran* v. *United States,* 157 U. S. 286. In those cases, this Court held that instructions as to the burden of proof and reasonable doubt are insufficient to advise the jury that the defendant is presumed to be innocent.

We think it is clear that neither the trial court nor the Circuit Court of Appeals in any way departed from the rule of the *Coffin* and *Cochran* cases. They simply took the position that petitioner's requested instruction was adequately cov-

ered in other portions of the charge. In addition to the last three paragraphs of the charge quoted above, which were relied upon by the court below (R. 288), we think the petitioner was plainly given the full benefit of the presumption of innocence by the first paragraph beginning with the sentence: "The fact that this defendant is here under indictment and on trial is not to be taken against him" (R. 238). These instructions are much broader in scope than the familiar definitions of reasonable doubt involved in the *Coffin* and *Cochran* cases, and made it perfectly evident to the jury that petitioner was presumed to be innocent until the contrary was shown. Since the instructions given were adequately equivalent to the "customary formula" (R. 288) embodied in petitioner's requested charge, the refusal to give it was entirely proper, for it is settled that the trial court is not required to phrase its charge in the language of counsel nor to repeat instructions already given in different language (*Agnew* v. *United States*, 165 U. S. 36, 51).

It is true that in so far as petitioner requested the court to charge that the presumption of innocence constituted "evidence in his favor", there are dicta in the *Coffin* and *Cochran* cases to support him. But as the court below pointed out (R. 289), that view has long since been repudiated by this Court. *Holt* v. *United States*, 218 U. S. 245, 253.[1]

[1] See also cases collected in 34 A. L. R. 938; 94 A. L. R. 1042.

The purpose of the presumption is two-fold: On the one hand, it embodies the principle that the prosecution must adduce proof beyond a reasonable doubt (Thayer, *Preliminary Treatise on Evidence,* App. B, pp. 551–553; *Wigmore on Evidence,* Section 2511). In this sense a charge on reasonable doubt would comprehend and render unnecessary a separate charge that defendant was presumed to be innocent. However the more important function of an instruction that the defendant shall be presumed innocent is to overcome so far as is humanly possible the natural inference of guilt arising from the circumstances that the accused has been formally charged with crime, is held in custody, etc. (see Thayer op. cit., *supra,* 561–563, 565). This important thought the trial court in the instant case conveyed to the jury, not in the technical phrase insisted upon by the petitioner—a phrase which "if used to a jury, peculiarly needs to be carefully explained" (Thayer op. cit. *supra,* 566)—but in simple and emphatic terms in the opening sentences of his charge, quoted above. Moreover, as was pointed out in the opinion below (R. 288), the trial court enjoined the jury to believe good rather than evil of the defendant, if the evidence permitted this. We submit that the instructions given went beyond reasonable doubt and burden of proof and gave the petitioner the full benefit of the presumption of innocence.

II

Petitioner's complaint that he was denied a trial by jury on the issue of the statute of limitations is entirely without merit. He was tried and convicted by a jury of twelve, which heard the evidence upon his plea of not guilty (R. 81–82, 245). It was open to the petitioner to prove the defense of limitations under the general issue (*Green* v. *United States,* 154 Fed. 401, 411 (C. C. A. 5th, 1907); *United States* v. *White,* 5 Cranch 73, 86 (C. C. D. C. 1836); see *United States* v. *Cook,* 17 Wall. 168, 179; *United States* v. *Brace,* 143 Fed. 703, 704 (D. C. Cal. 1906); cf. *United States* v. *Murdock,* 284 U. S. 141, 149–151). The plea and replication indicated that the availability of the defense turned on an issue of fact. It was not incumbent upon the trial court to resolve the issue preliminarily (cf. *State* v. *Snyder,* 182 Mo. 462, 503). His determination was limited, as petitioner's counsel made clear (R. 79–80) to the plea in bar and did not preclude a re-trial of the factual issue before the jury (See *State* v. *Hayes,* 162 La. 918, 922; *Thompson* v. *State,* 54 Miss. 740, 743–744; *State* v. *Rook,* 61 Kansas 382, 386). At the trial the government introduced testimony of the petitioner's flight before the petit jury (R. 167, 202–3), which he did not undertake to contradict.

There is, therefore, no need to rest, as the Circuit Court of Appeals did, on the failure of the defendants to object to the trial by the court of the issue of fact raised by the plea in bar. However, if waiver of jury is essential at the prelim-

inary stage, it may be observed that the petitioner was represented by three attorneys at all stages of the proceedings in the trial court (R. 61, 81); that the trial court ruled upon the question after a full hearing (R. 61–80); and that defense counsel at no time presented to the trial court a request for jury trial on the special plea or any objection or exception to the course which was followed. The present objection was not included in the "Grounds of Appeal" (R. 14–45) or the motion for new trial (R. 19–50); it was raised for the first time in the Circuit Court of Appeals. Cf. *Porter* v. *United States*, 91 Fed. 494, 497 (C. C. A. 5th, 1898). We do not believe that *Patton* v. *United States*, 281 U. S. 276 precludes a finding of waiver under circumstances such as these.

III

Petitioner urges that prejudicial errors were committed in the reception of evidence at the trial. In view of the overwhelming evidence of petitioner's guilt, these errors, if errors at all, would not warrant a reversal of the convictions. *United States* v. *Trenton Potteries*, 273 U. S. 392, 404; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 231. No less than six witnesses directly implicated petitioner in the robbery (R. 94, 103, 109, 114–115, 151, 152, 160). From their testimony it unequivocally appears that the petitioner, at the point of a gun, stole the car from which the license plates used on the robbery car were taken, and with a machine gun, robbed the owner of the car used

at the robbery. He left Portland, Maine, the night before the robbery in this car with the two men who have pleaded guilty to committing the robbery. He was positively identified as the man standing alongside the car outside the bank while the robbery was being committed. Late that evening, he stopped at a restaurant in Rochester, Vermont, together with the two confessed robbers of this bank.[2] At the trial, petitioner did not testify in his own behalf, claimed no alibi, and introduced no evidence otherwise to show his innocence.

In the light of this array of evidence, we think that each of these alleged errors were adequately disposed of by the court below (R. 285–287) and certainly present no question worthy of review by this Court.[3]

---

[2] Throughout the petition for certiorari the attempt is made to discredit the probity of the Government's witnesses (see esp. 40–46); but, obviously, this is not a matter for consideration by this Court, but one solely for the jury.

[3] With reference to petitioner's contention (Pet. 30) that it was error to permit the Government to impeach Edward Bentz insofar as he testified that petitioner was not involved in the crime, it should be noted that as an eye witness and participant in the crime, he was a "necessary" witness within the well-recognized exception to the rule against impeaching one's own witness. *Litsinger* v. *United States*, 44 F. (2d) 45 (C. C. A. 7, 1930); *Abdo* v. *Townshend*, 282 Fed. 476 (C. C. A. 4, 1922). Therefore, he might have been called "as the court's witness" leaving both sides free to cross examine or impeach. *United States* v. *Ike Young*, 107 F. (2d) 490 (C. C. A. 5, 1939); *Fournier* v. *United States*, 58 F. (2d) 3 (C. C. A. 7, 1932).

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. The petition points to no conflict of decisions and the decision of the Circuit Court of Appeals is correct. We, therefore, respectfully submit that the petition should be denied.

FRANCIS BIDDLE,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
Special Assistant to the Attorney General.

LOUIS B. SCHWARTZ,
MELVA GRANEY,
Attorneys.

MAY, 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941